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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Petitioners,

v.

TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THE CITY OF ALEXANDRIA, VIRGINIA, THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, THE COUNTY OF FAIRFAX, VIRGINIA, THE COUNTY OF PRINCE WILLIAM, VIRGINIA, AND THE COUNTY OF HANOVER, VIRGINIA

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QUESTIONS PRESENTED

1. Whether the Railroad Revitalization and Regulatory Reform Act prohibits a state from valuing and taxing real estate owned by a railroad in the same way that it values and taxes all other commercial and industrial real estate.

2. Whether the Act authorizes a federal court to require a state to conform to a single economic theory of value for rail property based on the court's weighing of the expert testimony in a given case.

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STATEMENT

The Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), 49 U.S.C. § 11503, prohibits discrimination in state and local property taxation by requiring, *inter alia*, that the ratio between the assessed value and the market value of rail property not exceed by more than five percent the same ratio for "other commercial and industrial property." *Id.* § 11503(c). Petitioners in this case claim that the courts must calculate the "market value" of all rail property for the purpose

of applying this formula by using a "unit" methodology —a process that begins by valuing an entire railroad as an ongoing business and then seeks to attribute some portion of that overall value to each piece of the railroad's property. Virginia uses a different approach, calculating the market value of real estate—whether owned by a railroad or by any other commercial or industrial land owner—not based on the particular use to which the parcel of land is now devoted but based on the best *potential* use and the resulting potential sales value of the property in the local market. According to petitioners, the Virginia approach, when contrasted to the unit method, overvalues their land by more than 5% and, therefore, Virginia violates the 4-R Act. The courts below rejected this claim, recognizing that statewide valuations of railroad property necessarily depend on the application of some economic theory of value and that, contrary to petitioners' submission, Congress did not intend to impose a single such theory on all states or to have the courts choose such a theory on the basis of the expert testimony in each individual case.

1. *Virginia's Method of Valuing Real Property.*—In Virginia, all real property is assessed for purposes of local property taxation based on its actual "fair market value" in the city or county where it is physically located. Va. Const. art. X, §§ 2, 4. This "fair market value," in turn, reflects "all the uses to which [the property] may be applied or for which it is adapted," not just its current use. *Richmond, F. & P. R.R. v. Commonwealth*, 203 Va. 294, 300, 124 S.E.2d 206, 210 (1962) (internal quotes omitted); *see County Bd. v. Commonwealth*, 240 Va. 108, 112, 393 S.E.2d 194, 196 (1990). The assessment of railroad land for local property taxation is done at the state level, using a system known as the "across-the-fence method." Under that method, the value of rail land is set by comparing it to comparable non-rail commercial and industrial property that has been valued at

its highest and best use. *See Richmond, F. & P. R.R. v. State Corp. Comm'n*, 219 Va. 301, 305-06, 247 S.E.2d 408, 410-11 (1978). Any property owner dissatisfied with his assessed value may seek administrative and, ultimately, judicial review. Va. Code Ann. § 58.1-2670 (Michie 1991) (state assessments); *id.* § 58.1-3984 (Michie 1991) (local assessments).

Virginia has followed this approach to taxing rail lands since the beginning of this century.[1] In 1983, however, the state transferred responsibility for assessing rail property from its Corporation Commission to its Department of Taxation ("DOT"), which chose to use a unit method for calculating such property values. Under that method, the land is given a value tied to its existing use (as a railroad) and calculated indirectly, by subtraction of non-realty values from overall business value. Specifically, the unit method first establishes a value for an entire interstate railroad as a going concern (based, for example, on stock values or projected earnings); it then assigns values to the non-real estate assets, and the residual number is deemed to be the value for the total of the railroad's real estate. That figure is then pro-rated based on the percentage of the railroad's track mileage within a given state and ultimately within each relevant taxing jurisdiction. *See, e.g., Union Pac. R.R. v. State Tax Comm'n*, 716 F. Supp. 543, 547 (D. Utah 1988).[2]

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[1] At that time, the railroads in Virginia successfully *opposed* a proposal to value rail property using the "unit method"—presumably because their profitability back then made such a system less favorable to them. *See Norfolk & W. Ry. v. Commonwealth*, 211 Va. 692, 699, 179 S.E.2d 623, 629 (1971).

[2] For example, if the value of a railroad's total real estate (calculated under the unit method) is $50 million and 10% of that property is located in Virginia, the Commonwealth could assess taxes on $5 million; further, if Virginia's ten percent is divided such that five percent is located in major urban areas and five percent is located in isolated rural areas, the railroad's real estate value would be identical in both situations.

As a result of the DOT's change to the unit method, certain local taxing jurisdictions in Virginia—those with high-value commercial and industrial real estate—witnessed a large decrease in the assessed value of railroad property. Two of those jurisdictions, respondents City of Alexandria and Arlington County, which contain large amounts of railroad property,[3] brought suit in state court, claiming that the DOT's use of the unit method violated the Virginia Constitution's requirement that property tax assessments reflect "fair market value." Va. Const. art. X, § 2.[4]

The Virginia Supreme Court upheld this claim, concluding that the unit method does not impose a tax on the value of real estate *qua* real estate, but instead looks only to a particular use and then calculates the value of that current use based on factors "unrelated to the land and its improvements," such as the efficiency of the railroad as a business or the skills of its managers. *County Bd. v. Commonwealth*, 240 Va. at 113, 393 S.E.2d at 197. Under this system, the court observed, the real estate owned by an unprofitable railroad would actually have a "negative value," a result that the court considered to be absurd. *Ibid.* In response to this ruling, the DOT adopted the "across-the-fence" methodology that had previously been applied to determine the "fair market value" of railroad property in Virginia.

2. *The Proceedings in This Case.*—Immediately after the Virginia Supreme Court's decision, the petitioner railroads filed the present action.[5] They claimed that the

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[3] This property includes several hundred acres in the "Potomac Yards," just west and south of National Airport.

[4] One of the petitioners in the present case, the Richmond, Fredericksburg and Potomac Railroad, participated in the state court case and supported the DOT's use of the unit method.

[5] The original defendants were the DOT officials responsible for assessing rail property in Virginia. Respondents City of Alexandria,

"true market value" of their property—as that term is used in the 4-R Act formula—can only be calculated by using the unit method of valuation, and that Virginia's system produced market values (and thus assessments) well above this measure of "true" value. Pet. App. 11a-12a. For all other industrial and commercial real estate, petitioners *accepted* Virginia's traditional valuation approach (based on the local market value of the land reflecting its highest and best use rather than its current business use), and noted that the assessments for that property concededly did not exceed market value. Thus, relying on two different concepts of value on the two sides of the statutory equation, petitioners submitted that the ratio between the assessed and market values for their property impermissibly exceeded the ratio for other commercial and industrial property in the state.

The district court granted summary judgment for the defendants, concluding that "[t]he language and legislative history of the [4-R] Act make clear that it does not impose a particular method of taxation on the state." *Id.* 13a. The court further ruled that petitioners had not shown a relevant factual dispute by pointing to the deposition testimony of a DOT official to the effect that, in his view, the unit method produced the "true" estimate of the value of rail property. *Ibid.*

The Fourth Circuit affirmed, likewise holding that the 4-R Act "does not provide a basis for parties to challenge a state's preferred accounting method" for establishing the "true market value" of a railroad's real estate. *Id.* 5a. Finding the statutory language to be ambiguous on this question, the court turned first to the legislative history, which it read as indicating that "Congress did not intend for courts to displace the state's policy choice

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Arlington County, Fairfax County, Prince William County, and Hanover County were permitted to intervene as defendants because they have the most concrete interest in defending the use of the "across-the-fence" method.

about what constitutes the best method for determining true market value of railroad land." *Id.* 6a. To support that view, the Fourth Circuit relied heavily on *Union Pacific*, *supra*, a Utah case in which the district court, after hearing six weeks of lay and expert testimony, found that it was unable to ascertain which of several potential methodologies correctly establishes the "true market value" of rail property, because the selection of a methodology necessarily rests on theories and assumptions that are not demonstrably true or false. 716 F. Supp. at 553-54. Recognizing that petitioners' contrary view of the 4-R Act would require the courts to select a "singularly correct" methodology, the court of appeals concluded that Congress did not intend for the courts to make such a "pure policy [decision], unguided by any judicially determinable notion of 'correctness' or 'truth.' " Pet. App. 10a.[6]

REASONS FOR DENYING THE PETITION

This case does not warrant review for two reasons. First, the Fourth Circuit's ruling—that the 4-R Act does not authorize judicial imposition of a single *methodology* for calculating the market value of a railroad's real estate—is correct. Second, the case satisfies none of the traditional criteria for certiorari: during the 15 years of the 4-R Act's existence, there has been almost no litigation concerning this issue and thus, not surprisingly, no conflict has arisen in the circuits.

1. Petitioners' position is that Congress's use of the term "true market value of . . . rail transportation prop-

[6] The Fourth Circuit also noted that Congress has generally disfavored "federal interference in state taxation decisions." Pet. App. 6a. While acknowledging that the 4-R Act was "an express exception to th[is] policy," the court declined "to disregard this general policy in areas where [the 4-R Act] does not plainly authorize such an exception and where the federal courts are ill equipped to evaluate the merits of a challenge to a state taxation scheme." *Ibid.* (citations omitted).

erty" in the 4-R Act's comparison formula means, as a matter of plain language, that courts must independently determine the best method to measure this value in every case. The court of appeals properly rejected that argument, because it recognized that to the extent that a railroad challenges a state's *method* of valuation, the question of "true market value" is not one of fact but reflects instead a "pure policy" choice, Pet. App. 10a, which Congress did not intend to remove from the states. The persuasiveness of this fundamental point is demonstrated by the two key (although unstated) premises of petitioners' claim here: (1) that the 4-R Act was intended to displace a state's decision about the nature of the "value" it wishes to tax, *even where railroad property is treated the same as all other property;* and (2) that Congress preferred these ultimately arbitrary policy choices to be made by the courts, with no legislative guidance. Nothing in the language, legislative history, purpose, or structure of the 4-R Act supports this radical construction.

a. Petitioners' first essential premise—that Congress's use of the words "true market value" of rail property in section 11503(b)(1)[7] must be read to require utilization of a special valuation method, applicable solely to railroads, based on the assumption that rail land can *only* be used as rail land—is incorrect for several reasons. To begin with, the statutory language simply does

[7] This section provides in full:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> > (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

not support such a reading. The statute refers only to "the true market value of the rail transportation property"; it does not include the words that petitioners would read into it: "*as that property is currently being used.*" Absent those limiting words, certainly the most natural reading of the term "market value" is what the land could secure in the market for its best and highest (and not necessarily its current) use. Indeed, the unit method has been described as not truly using a standard for *real estate* value at all. *See ITT World Communications v. San Francisco*, 37 Cal. 3d 859, 865, 693 P.2d 811, 816, 210 Cal. Rptr. 226, 231 (1985) (the unit method of taxation is "simply *not* real property taxation either in substance or in form") (emphasis added). Thus, petitioners' reading of the statute is actually at odds with its plain meaning.

To read petitioners' preferred words into the statute, moreover, would be directly contrary to the purpose of the 4-R Act, converting it from a shield *against* discriminatory treatment into a mandate *for* discriminatory treatment. Thus, for example, Virginia values *all* real estate not by its *current* use, but by its highest and best use. *See* p. 2, *supra*. And petitioners' entire claim rests on the premise that the Virginia method yields the correct measure of value for all *non*-rail commercial and industrial property (since they use the existing assessments and estimates of the market value of this property as their benchmark for comparison). Yet petitioners read the 4-R Act as mandating, at least in this case, adoption of a different standard of value, using a different methodology, only for railroads. That view would turn the 4-R Act upside down.

Petitioners' suggestion that section 11503(b)(1) requires their railroad land to be valued on the basis of its current use is also at odds with the actual experience in Virginia. Thus, for example, petitioner Richmond, Fredericksburg and Potomac R.R. Co. has in fact sold off a considerable amount of land in the Potomac Yards, re-

ceiving prices that reflected its value for commercial development and that far exceeded the value estimated under the unit method.[8] Petitioners offer not the slightest reason for suspecting that Congress would have wanted to allow railroads to insist that a state disregard these kinds of real-world possibilities when it adopts a measure of value for real estate owned by railroads.

b. Petitioners' second premise—that Congress not only wanted to prevent the states from applying their own methodologies for valuing rail property but also wanted the judiciary to select such a methodology based on the expert testimony in a particular case—further shows that petitioners' reading of the 4-R Act is incorrect. Petitioners recognize, as they must, that, for a railroad to be valued consistently throughout any taxing jurisdiction, *some* form of methodology not based on actual rail property sales must be used, because railroad property is not widely sold. Indeed, petitioners' entire claim is based *not* on a comparison of the assessed and actual market values of railroad land that has, in fact, been sold in Virginia, but rather on the allegation that their proposed unit methodology yields a better theoretical estimate of the true market value than does Virginia's across-the-fence approach.[9]

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[8] *See* Pls. Exh. 18 in *County Board, supra* (reflecting sales for prices that often reached more than $1 million per acre). *See also County Board*, 240 Va. at 111, 393 S.E.2d at 195-96 (change to unit method in 1984 dropped assessment of 420 acres in Potomac Yards from $80,820,700 to less than $20 million).

[9] The need for selecting some form of non-sales methodology for valuing rail property under the 4-R Act not only is acknowledged by petitioners, but also is strongly supported by the statutory language. Thus, the 4-R Act expressly states how the courts are to determine one of the two sets of variables—*i.e.*, the ratio between "assessed value" and "true market value" for "other [non-rail] commercial and industrial property." Specifically, section 11503(c)(1) requires application of a "sales assessment ratio study," 49 U.S.C. § 11503(c), which compares the sale prices of a sample of recently sold properties with their assessed values. *See Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461-62 (1987); S. Rep. No. 1483, 90th

But once it is acknowledged that the true market value of rail property must be derived methodologically, it quickly follows that the 4-R Act does not countenance challenges to each state's selection of a particular methodology from a variety of available options. That is true because, for the 4-R Act's formula to be capable of application, a single methodology of valuation is essential: otherwise, the mathematical comparison would be meaningless. One way to make the comparison possible is to respect the state's choice. The only other way would be to find in the statute itself a single methodology. But it is a patently implausible view of congressional intent to suggest that the 4-R Act contemplates a single methodology.

First, notwithstanding Congress's expressed awareness of several different valuation standards, *see* p. 12 *infra*, it did not specify a method for assigning value in the statute. Second, Congress could not have contemplated that the courts would select a method on the basis of competing expert testimony about which economic theory most accurately estimates "true market value" for rail property. That is simply an impossible task for courts: as the district court in *Union Pacific* concluded after listening to six weeks of expert testimony regarding valuation methodologies, a court "cannot say that any one method is necessarily more rational than any other." 716 F. Supp. at 555. The Court explained:

> Absent evidence of an actual sale, the term "true market value" is at best a rational fiction. Conclu-

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Cong., 2d Sess. 23-24 (1968). This calculation is possible, of course, only because for non-rail property there is an ongoing market that produces actual sales prices. By contrast, the 4-R Act provides *no* method for calculating the other half of the equation—the ratio of assessed to market value for rail property. While this omission does not indicate that the value of "[rail] property may not be proved at all," *Oklahoma Tax Comm'n*, 481 U.S. at 463 (footnote omitted), it does buttress the conclusion that valuation methodologies are not subject to attack—as footnote 5 of the *Oklahoma Tax Comm'n* opinion, which is the footnote omitted from the quote above, intimates.

> sions as to true market value are based on each appraiser's best judgment, and each appraiser approaches the task of valuation a little differently, with his own assumptions and theories as to what mythical buyers and sellers consider (or should consider) in arriving at an agreed-on price.

Id. at 554.[10] Not only would the process of selecting a "best" methodology be nightmarish as a practical matter —requiring lengthy trials based on a battle of experts, which will almost certainly lead different courts to reach different conclusions and thus require this Court, in order to ensure national uniformity, to impose a single methodology—but the very goal of a judicially determinable answer is illusory. Any choice, as the Fourth Circuit properly observed, would in the end be "one of pure policy, unguided by any judicially determinable notion of 'correctness' or 'truth.'" Pet. App. 10a.

Finally, we note that the 4-R Act further provides that "[t]he burden of proof in determining . . . true market value is governed by State law." 49 U.S.C. § 11503(c). That, of course, means that the plaintiff railroad—certainly in Virginia, and probably in all jurisdictions—will have the burden of proving that the state's determination of market value for its real estate is incorrect. But, as a logical matter, that burden can never be satisfied where the railroad's challenge is to a choice of methodology like Virginia's: because the issue involves a policy decision and not a question of fact, a court cannot find that the railroad has met its burden of proving the methodology incorrect.

c. The legislative history of the 4-R Act also confirms that Congress did not intend the federal courts to pick

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[10] The court reached these conclusions in a case limited only to different unit methodologies. A court's task obviously would become even more confounding in a case like this one, where a state uses an across-the-fence measure of land value, which will then have to be tested against one or more unit methodologies in order for the statutory calculation to be made.

and choose among competing valuation theories for rail property. At the time the 4-R Act was adopted, ten states used a valuation approach like Virginia's and 36 others used one or more of three different forms of the unit method: (1) business income capitalization, (2) market value of stock and debt, and (3) either original or reproduction cost less depreciation. *See* J. Runke & A. Finder, *State Taxation of Railroads and Tax Relief Programs* 27 (R. Marcelli, ed. 1977). Although Congress was aware of these varying approaches, there is not the slightest suggestion in the legislative history that it intended to have them replaced by a single methodology that the courts would ultimately conclude is better at estimating "true market value." On the contrary, in the Senate Report to one of the 4-R Act's precursor bills, a description of the divergence between "unit method" states and states "in which railroad property is locally assessed" was followed by a flat statement that the statutory formula does *not* impose "a standard for determining value; it is a standard to which *values that have already been determined* must be compared." S. Rep. No. 1483, 90th Cong., 2d Sess. app. B (1968) (emphasis added). *See also Burlington N. R.R. v. Lennen*, 573 F. Supp. 1155, 1163-64 (D. Kan. 1982) (reviewing legislative history), *aff'd*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984).

d. Petitioners offer three reasons to support their contrary reading of the 4-R Act. None of them has any persuasive force. To begin with, petitioners suggest that "immunizing discriminatory state tax methodologies from challenge would defeat the [4-R Act]," Pet. 13, because it would permit "wholesale discrimination through the adoption of result-oriented valuation methodologies," *id.* 16. We note initially that this argument is entirely hypothetical: petitioners have not pointed to a single state that has adopted a "result-oriented" valuation method designed to treat railroads unfairly. More fundamentally, however, a valuation "methodology" that "yields obvious

and substantial discrimination against railroads," *id.* 3, would *not* escape scrutiny under the 4-R Act. Such a discriminatory system, by definition, would have to single out railroad property for special treatment and would have to arrive at a market value in a way that is indefensible. Thus, for example, a state might assign a "true market value" to railroad property (but to no other property) that is three times the highest price received for any nearby property sold in the past year. But such a system would clearly violate the general prohibition of discriminatory taxation in section 11503 (b)(4) of the 4-R Act precisely because it arbitrarily and irrationally *singles out* railroads.[11]

Petitioners' final two arguments—(1) that the decision below is contrary to the reasoning in this Court's decision in *Oklahoma Tax Comm'n*, and (2) that the distinction between valuation *methodologies* and the *application* of such methodologies is meaningless—have largely been answered by *Oklahoma Tax Comm'n* itself. Thus, while the Court in that case did not resolve the question whether a state's valuation methodology may be disputed under the 4-R Act, it nevertheless noted a distinction between a challenge to "the valuation methodology employed by [a state]" and "the application of that methodology." 481 U.S. at 463 n.5. This statement hardly suggests that the Court considered its analysis to be inconsistent with such a distinction or that such a distinction would be meaningless.

As it turns out, moreover, the distinction is both sensible and workable. Selection of methodology, as we have explained, is not a judicially manageable or appropriate task. By contrast, there is no reason to think that a court would be unable to determine whether a state's chosen

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[11] For the same reason, even if petitioners' hypothetical of a blatantly discriminatory valuation "methodology" did escape 4-R Act scrutiny, there would be no need for concern since the equal protection clause of the Fourteenth Amendment would surely fill such a regulatory gap. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n*, 109 S. Ct. 633, 638 (1989).

methodology is being fairly and consistently applied. For example, under Virginia's across-the-fence method, if the state refuses to adjust railroad property values by taking into account the *same* factors as it does for other property—e.g., its shape, location, proximity to public transportation, etc.—then the state, *by its standard*, is not properly estimating the true market value of rail property. These, and related issues of application, are precisely the kinds of questions the courts normally decide in 4-R Act cases alleging tax discrimination against railroads. *See, e.g.*, Pet. 4 n.2; *id.* 6 n.4 (citing numerous cases). Indeed, despite petitioners' position here, one of them is currently challenging the *application* of Virginia's methodology to its property, arguing that its case is distinguishable from the Fourth Circuit's decision in this case. *See CSX Transp., Inc. v. Forst*, 777 F. Supp. 435 (E.D. Va. 1991).[12]

2. This case also does not merit review because it involves no issue of special importance or recurring concern, and there is no conflict among the circuits. To begin with, claims like petitioners'—challenging a state's choice of valuation methods—have rarely even been raised. Indeed, petitioners cite fewer than a handful of cases that present the issue. *See* Pet. 21-23. And, in the highly unlikely event that there is substance to petitioners' dire prediction—that the Fourth Circuit's decision will serve as "an open invitation for state tax officials to devise discriminatory methods for valuing railroad property" (*id.* 11)—there will be time enough for this Court to address *that* problem when it arises.

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[12] Petitioners cite *dicta* in a few cases stating that the distinction between methodology and application may not always be clearcut. Pet. 19-20. But those expressions appear to reflect little more than the customary confusion generated by unclear pleading, which can typically be clarified through pretrial motions. In any event, petitioners' suggestion that, in order to avoid the possibility of confusion at the margin, this Court should authorize the federal courts to subject each state's methodology to an abstract battle of the experts offers a cure that is much worse than the disease.

The paucity of litigation on this issue is further highlighted by the fact that no other court of appeals has even ruled on it, let alone disagreed with the decision in this case. Petitioners try to suggest otherwise, stating that the Fourth Circuit's position is "essentially opposed" to the views expressed by the Eighth Circuit in *Burlington N. R.R. v. James*, 911 F.2d 1297 (8th Cir. 1990). Pet. 21-23.[13] But their assertion is entirely unfounded. In *Burlington Northern*, the district court had held that the railroad was only challenging a state's valuation methodology and, relying on *Union Pacific*, *supra*, had dismissed the complaint as beyond its jurisdiction under the 4-R Act. *See* 911 F.2d at 1298, 1301. As petitioners concede (Pet. 22), the Eighth Circuit's reversal was premised on the fact that a "stipulation between the parties at least arguably framed the issue as one involving application of an accepted methodology" and thus presented a "colorable allegation" of unlawful discrimination. 911 F.2d at 1301. The court of appeals neither rejected the district court's reliance on *Union Pacific*'s distinction between challenges to a methodology and challenges to its application,[14] nor even intimated that the district court, on remand, should consider any challenges to the state's

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[13] Petitioners also state, in a footnote, that "[t]here is some indication that the Ninth Circuit . . . does not exclude methodology challenges from the scope of section 11503," (citing *Atchison, T. S.F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986), *abstention order vacated*, 828 F.2d 9 (9th Cir. 1987)). Pet. 23 n.26. This "indication" supposedly derives from a reference to an unappealed portion of a district court decision that undertook a "thorough study" of the methodology utilized by a taxing jurisdiction. 795 F.2d at 1445 n.8. Obviously, petitioners stretch too far in suggesting that it is "significant" that the Ninth Circuit did not go out of its way to criticize this aspect of the district court proceedings. Pet. 23 n.26. Indeed, it appears that the defendants in the district court never even raised the question whether a challenge to their methodology was cognizable.

[14] The Eighth Circuit's only quarrel with *Union Pacific* was with respect to an issue not relevant here—the requirement that there be some showing of discriminatory intent. 911 F.2d at 1301.

methodology for valuing railroads.[15] There is thus no conflict in the circuits.[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[15] The Eighth Circuit stated that the "district court obviously believed that, despite the parties' characterization of the issue, it would be required to weigh competing methodologies were it to determine the merits." 911 F.2d at 1301. The court of appeals acknowledged that this "belief may or may not prove to be true," *ibid.*, but simply held that there was no basis for assuming that the railroad was not pursuing a legitimate "application" claim on the record as it stood in the district court.

[16] Petitioners also suggest that there is expanding "disarray" among the district courts. Pet. 23. They cite, however, only *one* district court opinion that arguably takes a position different from that of the Fourth Circuit—*ACF Indus. v. California State Bd. of Equalization*, No. C-89-3449 (N.D. Cal. opinion filed Sept. 13, 1991). That decision evinces no awareness of the Fourth Circuit's earlier ruling in this case. This hardly constitutes a problem of "disarray" that needs to be addressed at this time.